[illegible] Term, 1993

Board of Education of the Kiryas Joel Village School District, Board of Education of the Monroe-Woodbury Central School District and Attorney General of the State of New York,

Petitioners,

vs.

Louis Grumet and Albert W. Hawk,

Respondents.

On Writ Of Certiorari To The Court Of Appeals For The State Of New York

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BRIEF AMICUS CURIAE OF COUNCIL ON RELIGIOUS FREEDOM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF INTEREST

Council on Religious Freedom is a national, nonprofit organization formed to uphold and promote the principles of religious liberty. Its board of directors, composed of individuals active in religious affairs, some in an official capacity and others on a lay basis, advocate these principles in state and federal courts throughout the country.

Because of Council on Religious Freedom's focus on the relationship of the Free Exercise Clause to the Establishment Clause, it offers to this Court an experienced and informed voice on the issue *sub judice*.

SUMMARY OF ARGUMENTS

A statute creating a separate school district for residents of a religious community is an act of religious gerrymandering and violates the Establishment Clause.

First, legislation which singles out a particular religious group for special benefit constitutes religious discrimination and thus requires strict scrutiny. Such a law must be closely fitted to a compelling state interest. Here, the legislature granted the Hasidic community of Kiryas Joel its own public school system. Because other less extreme measures existed to achieve the state's goals, the statute, on its face, violated the Establishment Clause.

Second, a "no set of circumstances" analysis is inappropriate for laws subject to Establishment Clause analysis. The speculative possibility that non-Hasidics may one day inhabit the school district does not prevent a facial challenge. Where the Establishment Clause provides the basis for decision, appropriate considerations include: historical

background, specific events leading to enactment, legislative or administrative history, and contemporaneous statements by members of the decisionmaking body. This analysis, not the "no set of circumstances" proffered by petitioners, compels the conclusion that a school district created to satisfy demands of a religious community violates the Establishment Clause.

Third, while the statute granting the Hasidic community its own "public school district" violated each of *Lemon*'s three-prong test, special concern exists with the secular purpose prong. The statute's legislative history, administrative interpretation, and the trial court's findings of fact confirm the purpose of the law was to religiously segregate Hasidic children from others in violation of the neutrality requirement of the Establishment Clause.

Fourth, other amici improperly use this case as a vehicle to challenge this Court's seminal decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). These efforts must be denied as this is not a traditional *Lemon* case involving financial aid to parochial schools. Nor is there need to address this issue when ample means exist for a decision based upon the "strict scrutiny" standard. Let such amici, who seek a review of *Lemon* and attempt to relitigate issues long ago addressed and resolved, do so in the setting of a factual record and not in the context of a non-*Lemon* case.

For these reasons, Council on Religious Freedom believes the interests of justice would be served by finding the state statute unconstitutional as an establishment of religion.

ARGUMENTS

I. THE LAW CREATING THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT WAS THE PRODUCT OF RELIGIOUS GERRYMANDERING DESIGNED TO AID THE SEPARATION TENET OF A RELIGIOUS ENCLAVE AND WAS NOT "CLOSELY FITTED" TO SERVE A COMPELLING GOVERNMENTAL INTEREST.

Although amicus believes that the creation of the Kiryas Joel Village School District violates all three prongs of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this amicus also believes that the appropriate analysis of this special interest case was set forth by Chief Judge Kaye who noted that the Court in *Larson v. Valente*, 456 U.S. 228 (1982), "concluded that the *Lemon* test is intended 'to apply to laws affording a uniform benefit to *all* religions' [citation omitted], but that when a law expresses 'a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.'" *Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 601 N.Y.S.2d 61, 71 (Ct. App. 1993). Judge Kaye found that the state statute "was specifically designed to benefit Satmar Hasidim, who refuse to send their disabled children to integrated Monroe-Woodbury public schools." *Id.* at 70. She further concluded "[t]hat the law is not part of a neutral, generally applicable program of State aid but instead was intended to benefit one religious group." *Id.* at 70.

Professor Jesse H. Choper concluded that the results in *Larson* were correct although contending that the case was a free exercise instead of an establishment case. He stated that

"[r]egardless of the historical relevance that the establishment clause may have had with respect to official governmental designation of a particular religious denomination for special treatment, the Court admitted in *Larson* that its modern three-prong establishment clause test was not really fashioned for the problem of discrimination or preference among religions." Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 [Special Issue] Wm. & Mary L. Rev. 943, 958 (1987).

Professor Choper agreed that "[t]he Court [in *Larson*] actually held that discrimination among religions must survive strict scrutiny. . . . Strict scrutiny, however, also requires the state to have had no narrower means available, and the Court felt that the . . . [legislation] was neither necessary nor 'closely fitted' to achieving the state goal. Therefore, the Court held the law invalid." *Id.* at 958 and 959.

Only one of the three petitioners attempts to refute Judge Kaye's *Larson* "strict scrutiny" analysis. Petitioner Kiryas Joel Village School District claims that Judge Kaye's analysis is not supported by *Larson v. Valente* because the statute is not "patently discriminatory." (Petitioner KJVSD Brf. at 31).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993), this Court rejected the same facial neutrality argument which is advanced here by all three petitioners. Citing *Gillette v. United States*, 401 U.S. 437 (1971), the Court stated that "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality.'" The Court, quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970) (Harlan, J., concurring), stated:

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. . . . "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Id. at 2227.

This case represents a classic example of religious gerrymandering. A law is not necessarily constitutional on its face because of the formal neutrality of the statutory language. And the creation of a public school district expressly designed to establish a political means of serving a sectarian interest is not rendered facially constitutional simply because its boundaries are described in non-religious terms.

In *Lukumi*, 113 S. Ct. at 2222, the Court held that the city ordinance directed at the Santeria religion violated the Free Exercise Clause because "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." Likewise, here the Establishment Clause is violated because the principle of general applicability was violated because the secular ends asserted in defense of the law to assist the Hasidic community were pursued only with respect to conduct motivated by religious beliefs.

Here the legislative act in question does not "afford[] a uniform benefit to *all* religions." *Larson v. Valente*, 456 U.S. at 252 (emphasis in original). No other religious group in New York State has been provided a religiously segregated public school district for their children even though other

groups might well wish to have their children separated from the undesirable influences of "non-believers." To permit the principle requires its equal application, and the state may not place itself in the situation of ferreting out whether the purpose is to avoid psychological harm to the child or perceived religious harm due to the mixing of believers with non-believers.

Lukumi gives us guidance in determining whether a law is in fact neutral. The Court stated in *Lukumi*:

> In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City*, 397 U.S., at 696, . . . (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. *Id.*, at 267-268. These objective factors bear on the question of discriminatory object. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279,

n.24 (1979).

113 S. Ct. at 2230 and 2231.

Lukumi Babalu Aye, 113 S. Ct. at 2233, further instructs that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[1]

Utilizing an equal protection mode of analysis, one cannot conclude that this statute was substantively facially neutral or of general applicability. This is not a case "where the state has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria." *Lee*

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[1]The amicus brief filed by the Rutherford Institute at page 12, note 10, argues that this case is different from *Larson v. Valente*, for although the Court there applied an equal protection mode of analysis, *Larson* involved a statute which on its face imposed a disability on a religious sect. While the present case, they claim, does not involve a facial distinction. They argue that "when a 'religious gerrymander' is alleged as a result of 'accommodating' a religious practice, for state action to be unconstitutional, there must be an *evidentiary* inquiry to determine whether that accommodation intentionally advances religion [citation omitted] and results invidiously in 'excluding individuals belonging to any other group from enjoyment of the relevant opportunity.'" (*Id.* at 12). They ignore the fact that in determining whether the statute is facially neutral under the Establishment Clause, the Court may consider historical background of the decision under challenge as well as the specific events leading to the enactment of the statute and also the legislative or administrative history.

v. Weisman, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring).

In *Larson*, Justice White acknowledged that this Court there had employed "a legal standard wholly different from that applied in the courts below." *Larson*, 456 U.S. at 260. He further noted that there was no finding by the district court of a deliberate and explicit legislative preference for some religious denominations over others. He also observed that "[t]here was no finding of a discriminatory or preferential legislative purpose." *Id.* at 260.

Here, however, the trial court specifically found:

> There is no doubt that the legislation was an attempt by the Executive and Legislature to accommodate the sectarian wishes of the citizens of Kiryas Joel by taking the extraordinary measures of creating a governmental unit to meet their parochial needs.

Grumet v. New York State Educ. Dept., 579 N.Y.S.2d 1004, 1007 (Sup. 1992). The court also found:

> The statute rather than serving a legitimate governmental end, was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district.

Id. at 1007.

The court further found:

> The present site can hardly be described as neutral. Rather, it lies squarely within the borders of a religious community, whose articulated goal is to remain segregated from the rest of society. Labeling the village as a "union free public school district" cannot alter reality.

Id.

The court likewise found:

> The Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave. . . . In fact, this school district was created solely and exclusively to meet religious needs.

Id.

These findings by the trial court require a conclusion that the law creating the Kiryas Joel School District is unconstitutional on its face because "[s]ince *Everson v. Board of Educ.*, 330 U.S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.' *Id.* at 15." *Larson*, 456 U.S. at 246.

Justice White in his concurrence in *Edwards v. Aguillard*, 482 U.S. 578, 609 (1987), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985), noted that

this Court believed "that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." All three courts below have made findings that the statute was designed for the express purpose of accommodating the separatist tenets of the Satmar Hasidic sect.

As Judge Kaye concluded, "this special interest legislation cannot be equated with the statutory scheme in *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 [1993] [where] . . . a parochial school student sought a sign language interpreter as 'part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends.'" *Grumet v. Board of Educ.*, 601 N.Y.S.2d 61, 72 (Kaye, C.J., concurring). Rather, as Judge Kaye notes, "[h]ere, by contrast, the State engaged in de jure segregation for the benefit of one religious group. Establishment of a public school district intentionally segregated along religious lines is a classic example of government action that must be 'survey[ed] meticulously.'" *Id.* at 72.

This Court in *Norwood v. Harrison*, 413 U.S. 455 (1973), held that private schools may have a constitutional right to operate in a discriminatory manner if they so choose, but the state has a coinciding constitutional obligation not to provide aid to schools which made such a decision:

> In any event, the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court

> holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.

Id. at 467.

The *Norwood* Court cited with approval Justice White's statement in *Lemon v. Kurtzman*, 403 U.S. at 671 n.2, "that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional." *Norwood*, 413 U.S. at 464 n.7. It would seem axiomatic that if the state is prohibited from providing secular textbooks to sectarian schools that discriminate on the basis of religion, the state may not draw political boundary lines for the express purpose of restricting entry of non-Hasidic children into a specially-created public school.

Norwood is based upon the principle "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Id.* at 463. Also, *see* generally *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983). Here, however, a public school district has been established for the express purpose of continuing to segregate Hasidic children from any other children.

As this Court stated in *Edwards v. Aguillard*, 482 U.S. 578, 585 (1986), citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), "teaching and learning" must not "be tailored to the

principles or prohibitions of any religious sect or dogma."[2] A few illustrations should serve to illustrate the impropriety of the practice here effectuated by the legislative and executive branches of the New York State government.

Loma Linda, California, an incorporated city, is an enclave primarily populated by members of the Seventh-day Adventist faith. Many Adventists reside at Loma Linda primarily because that is where Loma Linda University, a denominationally-owned university, and Loma Linda Medical Center, an Adventist owned medical facility, are located. Seventh-day Adventists generally subscribe to a creation theory. Would it be constitutionally proper for the state to create a public school district for the children residing within

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[2]In *Edwards v. Aguillard*, 482 U.S. at 590-91, in discussing *Epperson v. Arkansas*, 393 U.S. 97 (1968), this Court observed that:

> Although the Arkansas anti-evolution law did not explicitly state its predominant religious purpose, the Court could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible. . . . The Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," [citation omitted] and concluded "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." [Citation omitted.]

the Loma Linda city limits so as to provide a public education free from the teaching evolution?

Prior to last year, the Branch Davidians located outside of Waco, Texas, resided communally at a site known as Mt. Carmel. Would it have been appropriate for the State of Texas to create a special school district for the Branch Davidian children in order to prevent them from mixing with other public school children?

There are fundamentalist Christians who have elected to remove their children from public school because of the use of certain books and other educational materials with "humanistic content." A majority of like-minded parents could, under petitioners' theory, seek to establish a school district designed to protect their children from what they perceive to be anti-religious influences.

II. THE CREATION OF THE NEW SCHOOL DISTRICT VIOLATES THE "SECULAR PURPOSE" PRONG OF THE *LEMON* TEST.

As this Court stated in *Edwards*, 482 U.S. at 585, "*Lemon*'s first prong focuses on the purpose that animated adoption of the Act." This Court held that "[a] court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, *or its interpretation by a responsible administrative agency*. [Citations omitted.] The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." (Emphasis supplied.)

The legislative history of Chapter 748 has been set forth in respondents' brief. Of particular importance,

however, is the July 19, 1989, recommendation of disapproval issued by the State Department of Education (1 R 99-102). Among the reasons for disapproval, the Department stated:

> Census data obtained from the Orange County Department of Planning establishes that every inhabitant of Kiryas Joel is white. As the decision of the Court of Appeals described above confirms, all of its inhabitants are members of one religious sect, the Satmarer Hasidim. In addition, the superintendent of schools of the Monroe-Woodbury Central School District, the district in which Kiryas Joel is currently included, reports that only one student who lives in Kiryas Joel is enrolled in the public schools. All of the remaining school age children living in the village attend private religious schools located within the confines of the village. It should be noted that geographically, the Village of Kiryas Joel is well within the boundaries of the Monroe-Woodbury Central School District.

(1 R 100-101).

The Department's recommendation of disapproval further states:

> Given the nature of the dispute that apparently prompted this legislation, this bill also raises serious constitutional questions regarding potential governmental furtherance of religion in violation of the First Amendment's provision requiring the separation of Church and State. Although representatives of the

> village assert that they will take extraordinary care to create a special education school devoid of any religious message or teaching, the State would be accommodating the religious beliefs of a particular religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society.

(1 R 101).

Chapter 748 on its face violates the secular purpose test of *Lemon*. Even the New York State Department of Education -- the responsible administrative agency -- agrees. The department's recommendation of disapproval acknowledges the state would be furthering the church's desire to insulate the children from the larger society. Thus, the purpose of the statute violates the "secular purpose" test of *Lemon*.

III. THE TRIAL COURT WAS NOT PREVENTED FROM FINDING THE STATUTE FACIALLY UNCONSTITUTIONAL BECAUSE OF THE FUTURE POSSIBILITY THE SCHOOL DISTRICT MIGHT INCLUDE INHABITANTS WHO WERE NOT SATMAR HASIDIC JEWS.

Petitioner Kiryas Joel Village School District, although acknowledging that the school district is now composed exclusively of Satmar Hasidic Jews, argued that this does not mean that the arrangement is facially unconstitutional. Petitioners speculate that in the future the school district may include inhabitants who are not Hasidic. It argues that under this Court's holding in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Members of the City Council of Los*

Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984), respondents' facial challenge to Chapter 748 requires the Court to determine "that the statute could never be applied in a valid manner." (Petitioner KJVSD Brf. at 19-20).

Petitioner thus attempts to escape from the finding of the New York Court of Appeals that the new school district being coterminous with the Satmar Hasidic Community would have only Hasidic children attending the public schools of the new school district and only members of the Hasidic sect would likely serve on the school board. (*Id.* at 20). That petitioner argues that "[a]lthough the Village of Kiryas Joel is a community which is inhabited at present solely by adherents to one faith, no one is excluded from the village on the grounds of race or religion." (*Id.*). Petitioner concludes from this that the conditions existent when the school district was established and the historical background and specific events leading to the statute's enactment are irrelevant to the question of the facial validity of the statute under the Establishment Clause. (*Id.*).

To support its defense of the statute, petitioner cites *Mueller v. Allen*, 463 U.S. 388, 401 (1983), wherein this Court stated: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

Petitioners' "no set of circumstances" argument does not apply to Establishment Clause claims. In *Bowen v. Kendrick*, 487 U.S. 589, 627 n.1 (1988), Justice Blackmun, although disagreeing with the majority on the primary issue before the Court, further discussed the inapplicability of the "no set of circumstances" requirement in Establishment Clause cases:

A related point on which I do agree with the majority is worth acknowledging explicitly. In his appeal to this Court, Secretary of Health and Human Services vigorously criticized the District Court's analysis of the AFLA on its face, asserting that it "cannot be squared with this Court's explanation in *United States v. Salerno*, [481 U.S. 739, 745 (1987),] that in mounting a facial challenge to a legislative Act, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" [Citation omitted.] The Court, however, rejects the application of such rigid analysis in Establishment Clause cases, explaining: "As in previous cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." [Citation omitted.] Indeed, the Secretary's proposed test is wholly incongruous with analysis of an Establishment Clause challenge under *Lemon*, which requires our examination of the purpose of the legislative enactment, as well as its primary effect or potential for fostering excessive entanglement. Although I may differ with the majority in the application of the *Lemon* analysis to the AFLA, I join it in rejecting the Secretary's approach which would render review under the Establishment Clause a nullity. Even in a statute like the AFLA, with its solicitude for, and specific averment to, the participation of religious organizations, one

> could hypothesize some "set of circumstances . . . under which the Act would be valid," as, for example, might be the case if no religious organization ever actually applied for or participated under an AFLA grant. The Establishment Clause cannot be eviscerated by such artifice.

Reference to *Mueller v. Allen* is inappropriate here. *Mueller* was a statute that included a broad class of beneficiaries including parents of both public and private school children. The instant legislation, however, was designed to benefit only a single Hasidic community.[3] As indicated in the brief of petitioner KJVSD at pages 3-4, a 320-acre religious enclave incorporated as the Village of Kiryas Joel began its incorporation process in September of 1976 -- almost 17 years ago -- and still "virtually all residents of the village are Satmarer Hasidic Jews." This is hardly a case where statistics as to the number of Hasidic Jews residing in the village will appreciably change in the foreseeable future.

That petitioner also ignores the fact that, unlike *Bowen*, it is the creation of a school district intentionally designed to exclude all but children of Hasidic Jews, not the allocation or utilization of tax-derived funds that constitutes the constitutional offense. Whether the new school district's subsequent operations cross the permissible boundary between

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[3]As Chief Judge Kaye pointed out "this case . . . differs from previous Establishment Clause education cases" because it "is not one of the myriad 'government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion.'" (Citation omitted.) *Grumet v. Board of Educ.*, 601 N.Y.S.2d 61, 70 (Ct. App. 1993) (Kaye, C.J., concurring).

the secular and the religious is not the only constitutional concern. The constitutional boundary was violated the instant the state created a school district for the distinct purpose of exclusively serving students residing within a religious enclave. The continuing operation of a religiously segregated school district is a continuing constitutional violation. To paraphrase this Court in *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985), "[t]he legislative intent to . . . [exclusively serve a religious enclave] is, of course, quite different from merely protecting every . . . [handicapped child's right to a free appropriate public education as provided in 20 U.S.C. § 1412(1)]."

This case does not involve a law by which the Hasidic religious community's religious tenet of separateness was incidentally benefitted.[4] Here the only reason for the line-drawing and the creation of the school district was to accede to the demands of a religious community to keep its children separate from those who are religiously different from them. The organs of civil government may not be constitutionally utilized for such a purpose.

IV. THE NEW SCHOOL DISTRICT DOES NOT REPRESENT PERMISSIBLE ACCOMMODATION.

The brief filed by petitioner Attorney General for the

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[4]In *Norwood v. Harrison*, 413 U.S. at 464 n.7, this Court stated that "[t]he leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools." This Court also held in *Norwood* that "the Constitution does not permit the State to aid discrimination even when there is no precise casual relationship between state financial aid to a private school and the continued well-being of that school."

State of New York at page 25 argues that "this Court has a long history of recognizing the acceptability in some cases for the government to make allowances for concerns that are religious in nature." Petitioner KJVSD at pages 40-43 argues that the creation of the school district was a valid accommodation of religion. It cites as an example *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where this Court upheld the right of the Amish religious sect to be exempt from certain compulsory school attendance laws. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 456-57 (1988), in discussing *Yoder*, this Court said that "[t]he statute at issue in that case prohibited the Amish parents, on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion. [Citation omitted.] The statute directly compelled the Amish to send their children to public high schools, 'contrary to the Amish religion and way of life.'" (Citation omitted.)

In *Yoder* the Amish merely sought to be exempt. The situation here is entirely different. Here also no statute or governmental action prevented Hasidic children from receiving special education services. Rather, it was the independent private choice of the parents to withhold the attendance of their children in a public school setting unless and until public authorities provided a site that would segregate their children from other non-Hasidic children.

In his concurring opinion in *Lee v. Weisman*, 112 S. Ct. at 2677, Justice Souter stated:

> Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. [Citations

> omitted.] Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief.

Here neither government nor a private third party has imposed any burden upon the free exercise of the religious sect inhabiting Kiryas Joel.

Justice O'Connor in *Jaffree* has helpfully suggested that an accommodation of the free exercise of religion is permissible "when it lifts a government imposed burden on the free exercise of religion." 472 U.S. at 83 (O'Connor, J., concurring). As this Court noted in *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992), "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Further, as pointed out by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. at 84 (O'Connor, J., concurring), the state has no authority "to remove burdens imposed by the Constitution itself." In *Norwood v. Harrison*, 413 U.S. at 466, this Court indicated that providing secular textbooks to students attending racially segregated schools may well have been motivated by a sincere interest in the educational welfare of all of the state's children but "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."

More recently, Justice Blackmun in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in the judgment), in discussing accommodation in the form of a special tax exemption for religious books, indicated that he found it somewhat difficult to reconcile the

Free Exercise and Establishment Clauses values. According to Justice Blackmun, "[t]he Free Exercise Clause suggests that a special exemption for religious books is required." While "[t]he Establishment Clause suggests that a special exemption for religious books is forbidden," he opined that an accommodation in the form of an exemption from a state-imposed tax on religious literature would be appropriate if the state statute would "exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Id.* at 27-28. According to Justice Blackmun, a "narrowly tailored" law would meet the compelling interest that underlies both the Free Exercise and Establishment Clauses. *Id.* at 28.

This same reasoning is found in Judge Kaye's opinion in the instant case. She stated:

> The law's overbreadth, however, goes beyond symbolism. The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast. Thus, for example, there is no legal impediment to the new district's operation of a public school program for nondisabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it.

Grumet v. Board of Educ., 601 N.Y.S.2d at 72-73.

Judge Kaye, in further resonating Justice Blackmun's analysis in *Lee v. Weisman*, stated:

> Even if some sort of separate educational services were the only viable alternative, that could have been achieved without carving out a new school district. The Legislature could have, for example, enacted a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools. That would have satisfied the parents, and would supersede any residual claim by the District that New York statutory law precludes that action.

Id. at 73.

As Justice Frankfurter stated in *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., concurring), "if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone -- where the same secular ends could equally be attained by means which do not have consequences for promotion of religion -- the statute cannot stand."

V. THIS IS NOT AN APPROPRIATE CASE TO REEXAMINE THE *LEMON* TEST.

Petitioner Kiryas Joel Village School District and petitioner Monroe-Woodbury Central School District suggest that the *Lemon* test should be revisited if such action is

necessary to sustain the constitutionality of the statute. Petitioner Attorney General of the State of New York, however, does not request a review of *Lemon* but argues that the application of the *Lemon* test should result in a finding that the statute in question is constitutional.

Several amici, however, have seized this opportunity to call for a reexamination of *Lemon* and have fashioned various suggested Establishment Clause tests. This unique case, however, is not the appropriate vehicle to reappraise the three-prong *Lemon* test even if this Court believes that at the appropriate time such a reexamination is warranted.

Judge Kaye's concurring opinion below concluded that the *Lemon* test was not "the preferred analytical framework for this case," *Grumet*, 601 N.Y.S.2d at 69, because "legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, requiring that the law be closely fitted to a compelling State interest." Her analysis echoed this Court similar conclusion in *Larson v. Valente*, 456 U.S. 228 (1982), in which this Court stated that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

The Court concluded that "the *Lemon v. Kurtzman* 'tests' are intended to apply to all laws affording a uniform benefit to *all* religions, and not to provisions like . . . [legislation] that discriminate *among* religions." *Id.* at 252. As Justice Souter noted in *Lukumi*, 113 S. Ct. at 2247 (Souter, J., concurring) (quoting from *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), "the Court's better practice, once supported by the same principles of

restraint that underlie the rule of *stare decisis*, is not to '"formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"

Amicus United States Catholic Conference suggests that this Court overturn its 1985 decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985). Both of these cases concluded that it was unconstitutional for public school teachers to provide teaching services on the premises of pervasively sectarian elementary and secondary schools. Of course, both *Aguilar* and *Grand Rapids* were premised on this Court's holding in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). As recently as last term, this Court in *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993), took pains to distinguish the facts in *Zobrest* from those in *Meek* and *Grand Rapids*. *Zobrest*, 113 S. Ct. at 2468. This Court found that "the programs in *Meek* and *Ball* -- through direct grants of government aid -- relieved sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 2468. In discussing the *Grand Rapids* decision, this Court said:

> The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [Citation omitted.] "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." [Citation omitted.]

Id. at 2468.

The precise factual issues before this Court, of course, are substantially different from those previously decided in *Felton* and *Ball*. As Justice Souter recently indicated in *Lukumi*, 113 S. Ct. at 2247, the Court should refrain from announcing any radical departure from settled law unless it has been subject to "full dress argument." "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute."

Amicus U.S. Catholic Conference acknowledges that there are cases now in litigation which squarely focus upon the *Meek*, *Wolman*, *Felton*, and *Ball* line of decisions by this Court, such as: *Walker v. San Francisco Unified School Dist.*, No. 92-15977 (9th Cir. filed May 21, 1992), awaiting decision by the Ninth Circuit; and *Helms v. Cody*, No. 85-5533 (E.D. La. filed December 2, 1985), awaiting decision in the district court.[5] This Court should await any

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[5]The U.S. Catholic Conference mistakenly contends that *Helms v. Cody* is awaiting decision on cross-motions for summary judgment. To the contrary, there was a six-week trial on the merits with live testimony by numerous witnesses on behalf of both the plaintiffs and defendants with hundreds of pages of documentary evidence presented in the case. In the on-premises special education program, which was one of the programs under attack in *Helms*, the public school district entered into contracts with ten selected parochial schools assigning full-time special education teachers to teach the full range of secular subjects in self-contained classrooms. Several of the special education teachers providing on-premises instruction in these parochial schools were previously employed by the parochial school as regular classroom teachers. The students are enrolled as tuition-paying students in the parochial school receiving practically all classroom instruction other than religious instruction from the tax-

reconsideration of *Meek*, *Wolman*, *Felton*, or *Ball* until such time as a case specifically raising the on-premises instruction issue has been presented to the Court and fully briefed by the parties.

Council on Religious Freedom in its amicus brief filed with this Court in *Lee v. Weisman* argued that this Court should not abandon decades of judicial precedent and replace it with a new restrictive and untried test to apply to asserted violations of the non-establishment provisions of the First Amendment (Brf. of Amicus Curiae Council on Religious Freedom before this Court in *Lee v. Weisman* at 28-30). Attached as "Appendix A" to Council on Religious Freedom's amicus brief in *Weisman* was a comprehensive listing of hundreds of federal and state court decisions applying the *Lemon* test in Establishment Clause cases. Also included in "Appendix B" was a list of cases applying Justice O'Connor's helpful endorsement analysis. Council on Religious Freedom pointed out that revisiting all of the issues addressed in the cases decided under *Lemon* would add a tremendous burden to an already overburdened judicial system.

Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688-94 (1984), suggested a modification of the *Lemon* test to include an endorsement analysis which she articulated as follows:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of

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supported public school teachers.

> endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. at 690.

In *Wallace v. Jaffree*, 472 U.S. at 69, Justice O'Connor explained that "[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect." The endorsement analysis found its way into the majority opinion in *Wallace*, 472 U.S. at 56, wherein the Court stated that "[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'"

Justice Souter joined by Justice Stevens and Justice O'Connor in a concurring opinion in *Lee v. Weisman* specifically rejected the view pressed by numerous amici supporting petitioners that the Establishment Clause should be essentially restricted to a "coercion" analysis. *Lee v. Weisman*, 112 S. Ct. at 2671. They concluded that "we could not adopt that reading without abandoning our settled law, a course that . . . the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course." *Id.* at 2671. Certainly there is nothing in this case that requires such a reconsideration.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals of the State of New York should be

affirmed.

Dated: February 23, 1994

Respectfully submitted,

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